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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CITY OF SANTA BARBARA,
Petitioner,
v.
VICKIE L. EDWARDS, KATHLEEN ROSE MCCAULLEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE CITY OF SAN JOSE, THE CITY AND COUNTY OF SAN FRANCISCO, THE CITY OF DINUBA, THE CITY OF HURON, THE CITY OF LAGUNA BEACH, THE CITY OF MONTEREY, THE CITY OF ORANGE COVE, THE CITY OF POWAY, THE CITY OF SAN LUIS OBISPO, THE CITY OF SUNNYVALE AND THE CITY OF THOUSAND OAKS IN SUPPORT OF THE PETITION

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AUTHORITY TO FILE *AMICUS CURIAE* BRIEF

Amici curiae, eleven (11) local government entities, requested consent to file this brief from both the Petitioner, City of Santa Barbara, and Respondents, Vickie L. Edwards and Kathleen Rose McCaulley. Although the Petitioner provided its written consent, the Respondents have refused to do so. Accordingly, *amici curiae* file this brief pursuant to United States Supreme Court Rule 37.4, which provides that no motion for leave to file an *amicus*

curiae brief is necessary if the brief is presented on behalf of a city, county or town by its authorized law officer.

INTEREST OF *AMICI CURIAE*

Amici curiae are the following local government entities in the State of California: the City of San Jose, the City and County of San Francisco, the City of Dinuba, the City of Huron, the City of Laguna Beach, the City of Monterey, the City of Orange Cove, the City of Poway, the City of San Luis Obispo, the City of Sunnyvale and the City of Thousand Oaks.

Edwards v. City of Santa Barbara, 150 F.3d 1213 (9th Cir. 1995) ("*Edwards III*") is of great significance to *amici curiae* because it involves the constitutionality of carefully balanced legislation that addresses a difficult and increasingly widespread community problem: aggressive "in your face" protests. Although this modern protest tactic has occurred in a number of contexts, such as animal rights demonstrations and labor disputes, it has been most visibly associated with abortion-related demonstrations. Municipalities throughout the nation, including many of *amici*, have had to deal with frequent abortion-related demonstrations at health care facilities.[1] Although health care facility protesters wrap themselves in the cloak of the First Amendment, the reality is that the demonstrations involve harassment, intimidation, threats and violence (including murder) that far exceed legitimate areas of First Amendment free speech protection.

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[1] Responding to the abortion-related demonstrations has a very significant cost to municipalities. For example, *amicus curiae* the City of San Jose was one of the cities targeted as part of the "No Place To Hide" anti-abortion campaign occurring during the Summer of 1993. San Jose incurred unbudgeted costs and expenses of over $1.5 million in responding to the resulting demonstrations in order to protect its citizens from harm, keep the public peace and order, and safeguard the rights of patients seeking medical care and the free speech rights of the protesters and counter protesters.

The tactics of health care facility protesters tend to involve crowding around patients trying to enter health care facilities in an intimidating and obstructing manner. Protesters often wave signs and objects, such as plastic replicas of fetuses, at the patients in a threatening manner. They scream at patients, sometimes just inches from their faces, not to "kill" their babies and shout "murder, murder, murder" at patients. They point cameras at patients and photograph them, and record vehicle license plate numbers of patients. Protesters often become frenzied and start grabbing, tugging, pushing and shoving patients trying to enter health care facilities. In some instances, frenzied protesters have illegally entered health care facilities, knocking down employees and destroying medical supplies. Protesters often attempt to prevent access to health care facilities by surrounding vehicles, blocking the doors of the vehicles of arriving patients, and pounding on the windows and hoods of cars entering the facility parking lot.[2]

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[2] These and other tactics are well documented in the multitude of court decisions describing the relentless harassment that citizens from various municipalities have had to face. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 362-364 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 758-759 (1994); *American Life League, Inc. v. Reno*, 47 F.3d 642, 646 (4th Cir. 1995); *National Organization for Women v. Scheidler*, 968 F.2d 612, 615-616 (7th Cir. 1992), *rev'd* 510 U.S. 249 (1994); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1345-1346 (3rd Cir. 1989); *Portland Fem. Women's H. Ctr. v. Advocates for Life*, 859 F.2d 681, 683-684 (9th Cir. 1988); *U.S. v. Brock*, 863 F.Supp. 851, 855 (E.D. Wis. 1994); *Pro-Choice Network of Western New York v. Project Rescue of Western New York*, 799 F.Supp. 1417, 1421-1427 (W.D.N.Y. 1992), *aff'd in part and rev'd in part, Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1994); *Planned Parenthood v. Holy Angels Catholic Church*, 765 F.Supp. 617, 619-621 (N.D. Cal. 1991); *Feminist Women's Health Center v. Blythe*, 32 Cal.App.4th 1641, 1654-1656, 39 Cal.Rptr.2d 189, 194-195 (1995); *Bering v. SHARE*, 106 Wash.2d 212, 215-219, 721 P.2d 918, 921-923 (Wa. 1986).

A practice euphemistically called "sidewalk counseling" has emerged as part of these health care facility demonstrations. "Sidewalk counseling" consists of demonstrators foisting literature on health care facility patients in order to convince them not to undergo an abortion. *See Schenck v. Pro-Choice Network of Western New York,* 519 U.S. at 362-364; *Pro-Choice Network of Western New York v. Project Rescue of Western New York,* 799 F.Supp. at 1424-1425. "Sidewalk counselors" often attempt to accomplish their mission by harassing and intimidating the targeted patients. Even where "sidewalk counseling" starts off peacefully, the "counselors" often become angry and frustrated when patients persist in entering the health care facilities. *See Pro-Choice Network of Western New York v. Project Rescue of Western New York,* 799 F.Supp. at 1424-1425. As a result, the activities of the "sidewalk counselor" often degenerate into harassing, badgering, following, intimidating and yelling at patients in a threatening manner in order to dissuade them from entering the clinic even when a target repeatedly communicates a desire to be left alone. *See, e.g., Pro-Choice Network of Western New York v. Walker,* 994 F.2d 989, 992 (2nd Cir. 1993) (affirming a contempt judgment based on a "sidewalk counselor" impeding two women from entering a health care facility by pursuing them for an entire city block, yelling at them, crowding them and invading their personal space). Such conduct is not only upsetting to targeted patients, but also provides fertile ground for violent confrontations between demonstrators, counterdemonstrators and patients.

In the face of the above conduct, a number of municipalities, including some of *amici,* have adopted, or desire to adopt, a "move-back" or "back away" ordinance similar to the one adopted by the City of Santa Barbara.[3] The

[3] In addition to the City of Santa Barbara, other local governments adopting ordinances similar to Santa Barbara's move-back ordinance include the City of Phoenix in Arizona, the cities of San Jose, San Diego and Sunnyvale and the City and County of San Francisco in California, and the cities of Denver and Boulder

back-away ordinance represents a legislative decision about how best to balance the competing interests of promoting safe public demonstrations while protecting patients attempting to access health care facilities from nose-to-nose confrontations with demonstrators. The Ninth Circuit's opinion in *Edwards III* is of great concern to *amici curiae* because it unreasonably limits legislative authority and flexibility to address the problem of "in-your-face" protest tactics.

The impact of *Edwards III* on municipalities is heightened by the fact that it creates confusion for legislators. This Court's recent decisions in *Schenck v. Pro-Choice Network of Western New York, supra,* 519 U.S. 357, and *Madsen v. Women's Health Center, Inc., supra,* 512 U.S. 753, involved judicial review of injunctions that attempted to balance the competing interests of demonstrators and persons seeking access to health care facilities.

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in Colorado. City of Phoenix, Ariz., Municipal Code § 23-10.1; City of San Jose, Cal., Municipal Code § 10.08.030; City of San Diego, Cal., Municipal Code § 52.1001; City of Sunnyvale, Cal., Municipal Code §§ 9.94.010-9.94.030; City and County of San Francisco, Police Code §§ 4302-4303; City of Denver, Colo., Municipal Code § 38-114; City of Boulder, Colo., Municipal Code § 5-3-10.

The State of Colorado also has adopted a statute similar to Santa Barbara's move-back ordinance. Colo. Rev. Stat. § 18-9-122 (1996 Cum. Supp.) A First Amendment challenge to the constitutionality of the Colorado statute is currently pending before the Colorado Supreme Court in *Hill v. City of Lakewood.* The Colorado Court of Appeal first upheld the constitutionality of the Colorado statute in *Hill v. City of Lakewood,* 911 P.2d 670 (Colo.App. 1995). The United States Supreme Court subsequently decided *Schenck v. Pro-Choice Network of Western New York, supra,* 519 U.S. 357. The United States Supreme Court then granted a petition for *certiorari* to review the *Hill* decision. *Hill v. Colorado,* —— U.S. ——, 117 S.Ct. 1077 (1997). The United States Supreme Court subsequently remanded the *Hill* case to the Colorado Court of Appeal in light of the *Schenck* decision. On remand, the Colorado Court of Appeal distinguished *Schenck* and again upheld the constitutionality of the statute. 949 P.2d 107 (Colo.App. 1997) On January 12, 1998, the Colorado Supreme Court granted *certiorari* in the case.

In those cases, this Court explained that review of injunctions involving First Amendment rights are subject to more rigorous scrutiny than statutes or ordinances involving such rights. Applying this heightened scrutiny, this Court in *Schenck* and *Madsen* upheld broad "no speech" buffer zones that burden First Amendment speech to a far greater extent than the eight (8) foot move-back provision at issue in *Edwards III*. Thus, the decision of the Ninth Circuit in *Edwards III* creates confusion for local legislators regarding their authority to enact reasonable time, place and manner restrictions on First Amendment speech.

The significance of *Edwards III* to municipalities, such as *amici*, goes well beyond the context of health care facility demonstrations because municipalities face similar types of problems in a number of other contexts. *See, e.g., Krishna Society v. Lee*, 505 U.S. 672, 864 (1992) ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation"). *Edwards III* improperly limits the ability of municipalities to respond to such community problems in a creative and effective manner. Given the significance of *Edwards III* to municipalities, *amici curiae* join together to urge this Court to grant the petition for writ of *certiorari* filed by the City of Santa Barbara and to reverse the judgment of the Ninth Circuit by affirming the authority of legislatures to foster public safety by prohibiting harassing and intimidating conduct involved in "in-your-face" protests.

WHY REVIEW SHOULD BE GRANTED

I. THE *EDWARDS III* DECISION IMPROPERLY LIMITS THE ABILITY OF LEGISLATURES TO ENACT REASONABLE TIME, PLACE AND MANNER RESTRICTIONS TO PROTECT PATIENTS FROM HARASSMENT RESULTING FROM IN-YOUR-FACE CONFRONTATIONS.

As discussed in the petition for writ of *certiorari* filed by the City of Santa Barbara, the Ninth Circuit in *Edwards III* relied exclusively upon its previous decision in *Sabelko*

v. City of Phoenix, 120 F.3d 161 (9th Cir. 1997) (*"Sabelko II"*), to invalidate Santa Barbara's move-back ordinance. 150 F.3d at 1217. In *Sabelko II,* the Ninth Circuit invalidated a City of Phoenix back-away ordinance very similar, although not identical, to Santa Barbara's ordinance. In doing so, the Ninth Circuit incorrectly applied the heightened standard for judicial review applicable to injunctions that burden speech set forth in *Madsen v. Women's Health Center, supra,* 512 U.S. at 764-766, and erroneously relied upon *Schenck v. Pro-Choice Network of Western New York, supra,* 519 U.S. 357. *See* 120 F.3d at 164-165. This Court should grant review to reverse the Ninth Circuit's erroneous decision, which dramatically undermines the authority of local governments.

A. The Ninth Circuit Failed To Analyze The Back-Away Ordinance Under The More Deferential Standard Of Review Applicable To Legislation.

In *Madsen v. Women's Health Center, supra,* 512 U.S. at 764-766, this Court recognized that content-neutral legislation is subject to a more deferential standard of review than injunctions. This differing standard is based upon the separation of powers that underlies the checks and balances built into our system of government. The trial courts craft injunctions, and the function of appellate courts is to review trial court actions. Accordingly, broader review of injunctions is appropriate. In contrast, it is the function of the legislature to enact generally applicable statutes reflecting broad policy choices about the promotion of particular societal interests. The judiciary does not have plenary powers of review over such legislative actions. *See, e.g., Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803); *Euclid v. Ambler Co.,* 272 U.S. 365, 395 (1926).

The Ninth Circuit in *Sabelko II* acknowledged that content-neutral legislation, such as the back-away provision, is subject to a more deferential standard of review.

120 F.3d at 164, fn. 2. However, the Ninth Circuit ultimately did not apply the more deferential standard, holding that the back-away ordinance was not narrowly tailored because the "uncertainty concerning compliance establishes a substantial risk that more speech will be eliminated than the ordinance itself prohibits." 120 F.3d at 165. Thus, the Ninth Circuit effectively required the content-neutral legislation to meet the same test of validity as an injunction, i.e., that the legislation burden "no more speech than necessary." *See Madsen v. Women's Health Center, supra,* 512 U.S. at 765.

In *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989), this Court held that legislation need not set forth the least restrictive means to be narrowly tailored. It held that a regulation is narrowly tailored if it "promotes a substantial interest that would be achieved less effectively absent the regulation." *Id.* at 799. By failing to apply the more deferential standard of review applicable to content-neutral legislation, the Ninth Circuit in *Sabelko II* and *Edwards III* failed to give proper consideration to the separation of powers between the legislative and judicial branches. As a result, the Ninth Circuit has improperly limited the authority of *amici curiae* and other legislative bodies to enact time, place and manner restrictions to promote public safety by prohibiting harassing and intimidating conduct involved in "in-your-face" protests. Review must be granted to affirm the ability of legislatures to enact such regulations.

B. Contrary To The Ninth Circuit's Decision, *Schenck* Does Not Mandate The Conclusion That The Back-Away Provision Is Unconstitutional.

The Ninth Circuit in *Sabelko II* blindly and exclusively relied upon the discussion in *Schenck v. Pro-Choice Network of Western New York* of the "floating" buffer zone in concluding that the back-away ordinance also was not narrowly tailored. 120 F.3d at 169-165. In doing so, the Ninth

Circuit completely ignored the fact that this Court upheld the "cease and desist" requirement of the injunction at issue in *Schenck* as it applied to the fifteen (15) foot fixed buffer zones around the health care facility entrances. 519 U.S. at 381, fn. 11, 383-385. The "cease and desist" provision allowed two "sidewalk counselors" to enter the buffer zones until the targeted individual asked them to back away. 519 U.S. at 366, fn. 3. This is identical in material respects to the provisions of the back-away ordinance that permit a demonstrator to approach a targeted patient until requested by the target to move back to a more normal conversational distance.

This Court struck the fifteen (15) foot "floating" buffer zone at issue in *Schenck* based upon the conclusion that it was not narrowly taliored.[4] However, contrary to the implication of the Ninth Circuit's conclusion in *Sabelko II*, this Court did not hold in *Schenck* that all "floating" buffer zones are *per se* not narrowly tailored. To the contrary, in its discussion of the "floating" buffer zone, this Court in *Schenck* expressly did not decide whether the governmental interests involved would ever justify a zone of separation between individuals entering clinics and protesters, measured by the distance between the two. 519 U.S. at 377. This Court specifically acknowledged that the right to communicate is only the right to communicate from "an acceptable conversational distance." *Id.* at 377-378.

The Ninth Circuit's decision in *Sabelko II* also fails to recognize the material differences between the "floating" buffer zone at issue in *Schenck* and the back-away ordinance. This Court's conclusion that the "floating" buffer zone at issue in *Schenck* "burdens more speech than necessary to serve the relevant governmental interests" was

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[4] For this reason, this Court never reached the propriety of the "cease and desist" requirement in the context of the fifteen (15) foot "floating" buffer zone. *Id.* at 379.

based primarily on concerns about demonstrators knowing how to comply with the provision. 519 U.S. at 378-379. These concerns arose from the fact that the injunction at issue in *Schenck* created a fifteen (15) foot floating buffer around every person entering and leaving the health care facility enforceable against each protester. *Id.* This led the Court to conclude that demonstrators would have difficulty maintaining the fifteen (15) foot separation. *Id.*

Unlike the "floating" buffer at issue in *Schenck*, the back-away ordinance does not create a buffer around every person entering and leaving a health care facility. Rather, a demonstrator is allowed to approach a targeted patient until requested to move back. Critically, the eight (8) foot buffer need be maintained only as to the targeted patient. For example, assume that target one, who is entering a health care facility, has invoked the back-away ordinance against demonstrator one and target two, who is exiting the health care facility, has invoked the back-away ordinance against demonstrator two. It is not a violation of the back-away ordinance if demonstrator one, while communicating with target one, comes within eight (8) feet of target two.[5]

This Court also concluded that the fifteen (15) foot buffer zone in *Schenck* constituted a broad prohibition of speech because it prevented both communication from a "normal conversational distance" and handing leaflets to targeted patients. 519 U.S. at 377-378. Unlike the fifteen (15) foot buffer zone, the back-away ordinance does not

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[5] This Court in *Schenck* also noted that the "floating" buffer zone would be difficult to enforce because contempt proceedings likely would focus on whether protesters unknowingly strayed within the fifteen (15) foot buffer. 519 U.S. at 378, fn. 9. Under the back-away ordinance, this would be an evidentiary issue identical to the one trial courts frequently address in contempt proceedings involving the violation of a provision of a restraining order requiring one individual to stay a specified distance away from another specified individual.

burden speech. Until the provision is invoked, it does not prohibit demonstrators from approaching well within a "normal conversational distance" or closer of a targeted patient and offering the targeted patient leaflets. Even when invoked, the eight (8) foot distance is well within the bounds of a "normal conversational distance," and it does not prevent a demonstrator from offering leaflets to a targeted patient. The eight (8) foot distance requires speech to occur from a more appropriate, less threatening conversational distance from the recipient. *See infra,* pp. 11-13.

In short, *Schenck* did not resolve the issue of whether a back-away ordinance like the one at issue here is a narrowly tailored time, place and manner restriction. The erroneous reliance upon *Schenck* by the Ninth Circuit in *Sabelko II,* along with its failure to analyze the ordinance under the more deferential standard of review, resulted in a decision that dramatically undermines the authority of local governments. This Court should grant review to reverse the Ninth Circuit's erroneous decision.

II. REVIEW SHOULD BE GRANTED TO ESTABLISH THAT REQUIRING A DEMONSTRATOR TO COMMUNICATE FROM EIGHT (8) FEET AWAY FROM THE TARGETED PATIENT, UPON THAT PATIENT'S REQUEST, IS NOT A PROHIBITION ON SPEECH.

In *Sabelko II*, the Ninth Circuit mischaracterized the back-away ordinance as a "broad prohibition on speech" that effectively prohibits handbilling and normal conversation. 120 F.3d at 165. The legislative decision to require a demonstrator to withdraw to eight (8) feet upon the request of the targeted patient is based upon studies concluding that this is the minimum distance for "normal conversation" when being approached in public by a stranger. *See, e.g.*, Warren M. Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabor-*

tion Demonstrations, 12 Population and Environment: A Journal of Interdisciplinary Studies 379, 383-384 (1991) (communicating in public with a stranger from eight (8) feet reduces stress, discomfort, the impact of hostility, anger and the sense of being threatened, and enhances communication of the message); Mark L. Knapp, Nonverbal Communication in Human Interaction 130-131 (2d ed. 1978) (strangers should converse at greater distances apart).

The eight (8) foot zone does not prevent the demonstrator from continuing to communicate with the targeted patient. It does not prevent the demonstrator from offering the targeted patient a leaflet, or the targeted patient from accepting a leaflet if he/she chooses to do so. The back-away ordinance does not at all regulate the content of the message or the manner in which the message is conveyed, other than to require that it be conveyed from a distance of eight (8) feet if, and when, the targeted patient so requests. In short, the back-away ordinance recognizes that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *See Madsen v. Women's Health Center, supra,* 512 U.S. at 774. At most, the ordinance simply requires that speech occur from a minimal and somewhat less threatening distance from the unwilling recipient, regardless of the message being communicated or whether the targeted patient agrees or disagrees with the message.

As discussed above, this Court has recognized that face-to-face solicitation presents a risk of duress that is an appropriate subject of regulation. *See supra* p. 6. As also discussed above, *Schenck* did not foreclose consideration of all "floating" buffer zones and recognized that the right to communicate with an individual, even in a peaceful manner, is only from "an acceptable conversational distance." *See supra* p. 9. The case at bar pro-

vides this Court with the opportunity to provide *amici curiae* and other legislatures with guidance on whether an ordinance that requires, at most, communication from "an acceptable conversational distance" even constitutes a prohibition of speech.

III. THE FIRST AMENDMENT PRINCIPLE UNDERLYING THE *EDWARDS III* DECISION CONFLICTS WITH THOSE PRINCIPLES ARTICULATED BY THIS COURT IN *MADSEN* AND *SCHENCK*.

This Court in *Schenck v. Pro-Choice Network of Western New York* and *Madsen v. Women's Health Center, Inc.* held that, even under the more rigorous review applicable to injunctions, access to health care facilities could be protected by the use of broad "no speech" buffer zones without infringing on the First Amendment rights of demonstrators. In *Madsen*, this Court upheld a provision of an injunction completely prohibiting any First Amendment activity within thirty-six (36) feet of the property line of a health care facility. 512 U.S. at 769-770. This "no speech" buffer zone included public sidewalks and streets, and resulted in moving the demonstrators all the way across the street from the health care facility. *Id.* Likewise, in *Schenck* this Court upheld a fifteen (15) foot "no speech" buffer zone around the door entrances, parking lot entrances, driveways and driveway entrances of the health care facility. 519 U.S. at 380-385.

The First Amendment principle underlying the Ninth Circuit's decision in *Edwards III* is that "floating" buffer zones are a *per se* violation of the First Amendment. As discussed above, this principle is incorrect. *See supra* p. 9. Moreover, in the context of the case at bar, this principle is inherently inconsistent with those First Amendment principles relied upon in *Madsen* and *Schenck* because the eight (8) foot back-away provision does not burden speech like the "no speech" buffer zones upheld in those cases. Even assuming the back-away ordinance inadvertently infringes on speech, it clearly still does not

restrict as much speech as the broad "no speech" buffer zones upheld in *Madsen* and *Schenck*. This Court should grant review in this case to clearly establish that legislatures can choose less drastic measures than traditional "no speech" buffer zones to promote peaceful demonstrations and protect access to health care facilities.

CONCLUSION

Given the growing polarization of society on a number of sensitive issues and increasingly aggressive protest tactics, legislatures need to be able to act creatively and forcefully in order to effectively balance First Amendment rights against the countervailing rights at issue. *Edwards III* prevents legislatures from acting in such a manner by improperly limiting the authority of legislatures. Accordingly, *amici curiae* urge this Court to grant the petition for writ of *certiorari* filed by the City of Santa Barbara and to reverse the judgment of the Ninth Circuit in *Edwards III*.

Respectfully submitted,

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